



**Rural Retreat 2009 Presentation
Archiving E-mail and Data
January 27, 2009
Morris Haggerty, AAG, Risk Management**

- **Archiving E-mail and Data**

- This session will discuss the legal requirements of email documentation. Such issues as why to archive, what is required to be archived, when is archiving necessary, and how long should email be retained will be addressed. 45 minutes.
- Legal Aspects of Email Archiving Follow up by Morris Haggerty, State of Utah Risk Management Location: Red Canyon A. This session will provide an opportunity to discuss specific questions to the legal aspects of email archiving as a follow-up to the general session. 90 minutes.

- **Archiving**

- Why should/must you archive documents.
 - Simple answer: State law requires you to archive certain documents.
 - Complex answer: You work for the government. The government is not a person who remembers when it was born, what it does, and why it does it. It is a complex group that can only preserve the who, what, where, why and how information through archiving important, relevant documents showing what decisions were made and why.
 - **Slide 2** From Archives website: "Retention Schedules are timetables that indicate how long a record has business value. Records are appraised according to the following criteria: administrative, fiscal, legal and historical value. Once the value has been fulfilled, one of two things happen: the records are destroyed, or they are preserved for permanent use. Often permanent records are transferred to the Archives for access and long-term care. Before a record can be destroyed, erased, deleted, or made otherwise unavailable, a retention schedule for that record must be established and approved by the State Records Committee."
- **Slide 3** What should/must you archive?
 - <http://archives.utah.gov/recordsmanagement/grs/schoolgrs.pdf>



- Some examples of the most significant items:

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- **GOVERNMENT RECORDS ACCESS AND MANAGEMENT ACT (GRAMA) SCHOOL DISTRICT APPEALS CA (Item 1-10)**
These case files document the appeals for access of school district records to separate district appeals bodies (i.e., school board or separate board) in accordance with school district policies adopted under authority granted in the Government Records Access and Management Act (GRAMA) (UCA 63-3-701 (1995)). These case files include copies of the access request and denial forms, the appeal, research notes, commission or board decision, and any other documentation concerning the appeal process. **RETENTION** Permanent **SUGGESTED PRIMARY DESIGNATION** Public.

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- **POLICY AND PROGRAM CORRESPONDENCE (Item 1-6)**
These records are business-related correspondence that provide unique information about agency functions, policies, procedures, or programs. The records document material discussions and decisions made regarding all agency interests, and may originate on paper, electronic mail, or other media. This correspondence is filed separately from program and project case files. **RETENTION** Permanent. **SUGGESTED PRIMARY DESIGNATION** Public.

Slide 6

- **POLICY AND PROCEDURE CASE FILES (Item 1-21)** These files contain records related to the issuance of policies and procedures and document their formulation. Includes narrative or statistical reports and studies regarding district or office operations, and related correspondence. **RETENTION** Retain for 2 years after being superseded and then destroy. **SUGGESTED PRIMARY DESIGNATION** Public.

Slide 7

- **TRANSITORY CORRESPONDENCE (Item 1-1)**
Business-related correspondence that is routine or transitory in nature and does not offer unique information about agency functions or programs. These records include acknowledgment files and most day-to-day office and housekeeping correspondence. These records may originate on paper, electronic mail, or other media. This correspondence is filed separately from program and project case files. **RETENTION** Retain until administrative need ends and then destroy. **SUGGESTED PRIMARY DESIGNATION** Public.



Slide 8

- **BUDGET WORKING FILES (Item 3-5)** These files contain working papers used to assist in the preparation of district's budgets and to justify budget requests presented to the school board. Includes departmental budget requests, work-up sheets, cost estimates, and rough data accumulated in the preparation of annual budget estimates, related correspondence, and documentation for approval of final budget. **RETENTION** Retain for 1 year after the close of the calendar year covered by the budget and then destroy. **SUGGESTED PRIMARY DESIGNATION** Public. **SUGGESTED SECONDARY DESIGNATION** Private: UCA 63G-2-302(1)(f) (2008)

Slide 9

- **BUDGET INFORMATION FILES (Item 3-4)** These files document the adoption of the district's annual budget. Includes recommended budget, tape recordings of public hearings associated with finalizing budget, and all related correspondence. Files may also contain budget amendments and any other actions affecting the budget. **RETENTION** Retain for 1 year after budget has been adopted and then destroy. **SUGGESTED PRIMARY DESIGNATION** Public.

Slide 10

- **EMPLOYEE TRAINING FILES (Item 14-14)** These files document course availability and school district personnel participation in training programs sponsored by the district, other government agencies, and non-governmental agencies. They include correspondence, reports, participant lists and other items. The actual training certificates and transcripts are filed in individual personnel files. **RETENTION** Retain for 6 years and then destroy. **SUGGESTED PRIMARY DESIGNATION** Private.

Slide 11

- **INTERVIEW RECORDS (Item 14-28)** These are records relating to interviews with prospective employees and described in 29 CFR 1602.14 (1992). They include correspondence, reports, lists of questions, notes, and test scores. **RETENTION** Retain for 6 months after hiring decision is made and then destroy. **SUGGESTED PRIMARY DESIGNATION** Private.

Slide 12

- **PRINCIPAL'S PERSONNEL FILES (Item 19-34)** These are records maintained by the school's principal on all school employees. They are used for easy reference. The school district office maintains the official personnel file on all district



employees. These files include copies of the application form, performance evaluations, career ladder information, and teaching observation forms. The official copies of all personnel files are usually maintained by the district's personnel office. RETENTION Retain for 65 years or for three years after retirement or death of employee and then destroy. SUGGESTED PRIMARY DESIGNATION Private. SUGGESTED SECONDARY DESIGNATION Public:UCA 63G-2-301(1)(b)

Slide 13

- STUDENT DISCIPLINE FILES (Item 19-48) These are files maintained by the vice-principal or counselors on students who have misbehaved in class or on the school grounds. The files include notes, teachers' reports, memoranda, standard violation tickets, reprimands, related correspondence, individual progress reports, and student counseling reports. RETENTION Retain for 1 year after student leaves school and then destroy. SUGGESTED PRIMARY DESIGNATION Private.

- **Emails**

- How does email fit into this archiving scheme?
 - **Slide 14** You first have to get it through your heads, emails are just documents. They are the exact same as a computer prepared report, typewritten letter or a handwritten note.
 - Once you accept that, on one level the requirements to retain and archive emails are simple—follow the general retention schedule and treat emails like you would treat any other document.
 - Examples:
 - A rumor is going around that emails do not have to be retained if a school district does not have a policy requiring that emails be kept. This is not true, the retention schedules apply to all documents in all forms that meet a category description. It is not determinative whether a document is a memo, letter or email, what is determinative is the content. The category should be looked at and if an email's content fits within the category then the email must be retained.



- What form should email be saved in?
 - For some uses like GRAMA or archiving, it can be printed and placed in a file.
 - But this presents certain problems, it is better to retain it in electronic form if you can. Why? Metadata is preserved that way.
 - Metadata will likely show who sent it and when, who got it, when they opened it, even whether they forwarded it or changed it.
- What if emails are not documents that are required to be retained and archived. Do you have to save those? This is where things get a little more complex than we have talked about because you literally have millions of emails flying back and forth that you need to make decisions on.
 - Develop your own retention policy dealing specifically with emails.
 - Examples of policies: Retain all emails permanently.
 - Retain all emails for x months. Most common policy right now.
 - Retain emails with business significance permanently.
 - Retain emails with business significance for x months.
 - Salt Lake City's Policy:



Slide 15 *To ensure that important information is not lost because of improper deletion or management of e-mail correspondence, Salt Lake City employees are directed to adhere to the following e-mail use guidelines.*

Broadly speaking, e-mails fall into two main categories: those that may be deleted and those that must be saved for future reference or public/media access.

Slide 16 ***E-mail that must be saved (may not be deleted)***

Program, policy, or decision-making correspondence: Except for certain cc's described below, business-related messages that provide substantive information about City functions, policies, procedures, or programs must be saved. These e-mails document the discussions and decisions made regarding City interests.

Slide 17 ***E-mail that may be deleted***

All e-mail not falling into the above category may be deleted when the user's need for the e-mail has expired. Examples of e-mail messages that do not need to be saved are:

Personal e-mail

Routine correspondence

Meeting agendas, broad e-mail announcements, and e-mails on which you are cc'd, if you have no use for them.

Note: the sender and direct recipient of program, policy, or decision-making e-mail must retain the message unless the sender already classified it as program, policy, or decision-making correspondence.

Slide 18 ***Attachment policy***

You are required to keep a copy of any attachments you send (e.g., Word, Excel or Powerpoint files) if they fall under the category of program, policy, or decision-making correspondence.

Slide 19 ***Responsibility of the sender***

Primary responsibility for retention of important e-mail rests with the sender. As such, when a person attempts to send an e-mail, a dialogue box will ask the sender to mark whether the e-mail is (1) program, policy, or decision-making correspondence, (2) confidential (e.g. attorney-client privileged), or (3) other. If an e-mail is marked as policy, program, or decision-making, or as confidential, a copy will be automatically saved.

Slide 20 ***Responsibility of the recipient***

If you are the direct recipient (not cc'd) of e-mail containing policy, program or decision-making information, you must save the email unless the sender already classified the e-mail as policy, program, or decision-making correspondence.



- Get the technology in place to deal with this.
 - A system that allows or requires you to identify emails up front before you can send them.
 - A system that allows for large off-site storage with search capabilities.
- **Slide 21** What is the State doing?
 - <http://archives.utah.gov/recordsmanagement/ERM/email-guidelines.html>

Page 3: *E-mail records should be placed in some kind of record-keeping system. A record-keeping system can sort records according to purpose and retention schedule, provide security against unauthorized access or destruction, facilitate efficient retrieval, and preserve important information. Once the record is in the system, the original electronic source record that may still exist in the in or out box should be destroyed. Any backup tapes to the e-mail system, containing only duplicates, could then also be destroyed.*

Currently, most email is managed by the user placing emails in folders within their existing email system and deciding how long the contents of each folder are kept. This relies on the user to do things right.

Slide 22 The State has recommended that email management be moved to a centralized system: *Software that is purchased, developed, or customized to automate the records management functions offers greater control over when and how records are viewed by an organization (not just the creator), destroyed, or transferred to the State Archives. This type of software centralizes many functions that are then overseen by a professional records manager. Central control of e-mail records management alleviates issues such as duplicates and tends to better organize extended correspondence among multiple users while also ensuring legal compliance. The oversight of deletion or purging of e-mails from the system is also concentrated among trained records managers as opposed to relying on every employee in each agency to maintain compliance.*

But only “records” will be saved: **Slide 23** *Principally, e-mail that is work-function related, and has administrative, legal, fiscal, or historic value, is a record. Conversely, documents that are considered non-records include: drafts, personal notes or communications, proprietary software, copyrighted material, junk mail, commercial publications, and personal daily calendars. Personal records as defined by UCA § 63G-2-103, created or received through e-mail systems, do not require a formal retention schedule. The recommendation is to destroy upon receiving or sending.*



Slide 24 ***Transitory Correspondence:** This is business-related correspondence that is routine or transitory in nature and does not offer unique information about agency functions or programs. These records include acknowledgment files and most day-to-day office and housekeeping correspondence. These records may originate on paper, electronic-mail, or other media. This correspondence is filed separately from program and project case files.*

*Retention: Record Copy: Retained by agency until administrative need ends, and then destroy.
Duplicate Copies: Retain by agency until administrative need ends, and then destroy.*

Slide 25 ***Policy and Program Correspondence:** Business-related correspondence which provide unique information about agency functions, policies, procedures, or programs. These records document material discussions and decisions made regarding all agency interests, and may originate on paper, electronic mail, or other media. This correspondence is filed separately from program case files, and project files.*

Record Copy: Permanent; retained by agency until administrative need ends, and then transfer to State Archives with authority to weed. Duplicate Copies: Retain by agency until administrative need ends, and then destroy.

Page 5: The "record" copy is the sender's copy. Recipients can delete their copies unless the email comes from outside the state government system.

Slide 26 The suggested solution to do this is contract with a business that stores emails off-site, provides extensive search capabilities, and will do this for \$300,000 up front and 5 figures per year after that. Funding will likely not occur this year.



- **Litigation supersedes all of this.**
- **Slide 27** When you become aware of the likelihood of a claim or lawsuit you should put a "litigation hold" on all documents, including emails, that are potentially relevant to the claim or lawsuit.
 - Reasonable likelihood of a claim or lawsuit.
 - What this means is that when you receive a notice of claim, are served with a lawsuit, or become aware of a reasonable likelihood of a lawsuit
 - Must suspend normal deletion.
 - Collect and preserve all documents related to the subject matter of the lawsuit--hold them for litigation purposes.
 - This includes electronic documents like emails.
 - It includes computers, pdas, cell phones, Blackberries.
 - It is not enough to simply print out potentially relevant emails, you have to save the electronic version.
 - The IT people need to be made aware of the litigation hold and then they have to be able to preserve emails and other documents.
 - This must be a coordinated effort. Call Risk Management. Contact your IT people. Contact anyone who might have documents, including emails, that might be relevant and have them save documents. Have IT check that they are saving them the correct way. Make copies if necessary.
- Electronic Discovery
 - What happens when the School District is sued? You call Risk, an attorney is assigned, the attorney sends you a letter saying collect all the documents and don't destroy anything. You have the HR file copied, you ask the principal to copy her file. Maybe you wait to do this until the attorney calls, the attorney gets hold of you from 10 days to 10 months later and you do the work at that time to gather everything.



- If this happens today, you could have judgment entered against you for destroying evidence and you pay out a verdict for several million dollars. Why? Because you didn't sufficiently preserve all documents related to the litigation.
- Most documents now exist in electronic form. The rules of procedure in the federal court and state court require that you preserve the electronic information. You have to take steps to do that.
 - Paper copies of documents are no longer adequate. You need to preserve electronic copies. Why? Because the electronic version of an email typically says when it was sent, when it was received, and when it was opened. This is invaluable information to prove when something happened, that it really was received, that it really was read. A Word document tells who the author was, whether it was revised, and what changes were made and by whom.
- Your IT systems routinely destroy documents. Your personnel routinely destroy documents. And none of this is done maliciously, it happens automatically or as an unthinking routine. So you have to take steps to do this.
- What do you do? You develop a plan now. Meet with your IT people to see what electronic information you have, how the electronic data flows through your system, how it is backed up, what the settings are on deleting documents or truly deleting deleted documents. Then develop policies on how you preserve information once a lawsuit is threatened—notice of claim, or is actually filed. Then meet with your attorneys and develop policies on document retention. Can people delete emails? Consider classes of emails—personal, business, policy, etc. Consider GRAMA requirements as well as lawsuits. What happens when people quit or retire, where do their files go, where does their computer go. How do you get word out when a notice of claim is received. Then meet with your IT people again to give them the information from the attorneys and fine tune your systems.



- United Medical Supply Co., Inc. v. U.S. 2007 WL 1952680, *1 (Fed.Cl.) (Fed.Cl. 2007): “Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings-erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of ad hocery and half measures-and our civil justice system suffers. To guard against this, each party in litigation is solemnly bound to preserve potentially relevant evidence.